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No. 86-2064

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

DANNY PIPES, and CHARLES PAYNE,

Petitioners,

vs.

STEVE BENNY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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DANNY PIPES, and CHARLES PAYNE,

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vs.

STEVE BENNY,

Respondent.

RESPONDENT, Steve Benny, opposes Petitioners request that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on September 5, 1986, and amended on January 16, 1987, Affirming the Judgment of the United States District Court for the District of Arizona.

STATEMENT OF THE CASE

Petitioners have basically set out to the Court in their Petition for a Writ of Certiorari the statement of the case, and it is not necessary to make any correction thereon pursuant to Rule 34.2.

SUMMARY OF ARGUMENT IN OPPOSITION TO GRANTING THE WRIT

1. The Petition neglects to set forth considerations governing the issuance of an extraordinary writ in that it does not set forth the Court's jurisdiction pursuant to Rules 21.1(e)(iv), 21.2 and 27.2(b).

2. The Petition seeks review of certain factual and legal determinations by the District Court and affirmed by the Ninth Circuit Court of Appeals but fails to establish any special and important reasons for granting the writ.

3. The District Court and the Ninth Circuit Court of Appeals correctly found that Respondent was entitled to the relief granted him pursuant to his complaint filed under the authority of 42 U.S.C. §1983.

REASONS FOR DENYING THE WRIT

1. THE PETITION DOES NOT INVOKE THE JURISDICTION OF THIS COURT.

The Petition filed herein does not follow the Rules of the Supreme Court of the United States.

Rule 21.1(e)(iv) states:

> ".1 The Petition for Writ of Certiorari shall contain, in the order here indicated: . . .
> (e)(iv) The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari.
> Rule 21.2 states in part:
> ". . . The clerk shall not accept any petition for writ of certiorari that does not comply with this rule . . ."
> Rule 27.2(b) states in part:
> "The petition shall follow, insofar as applicable, the form for the petition for writ of certiorari prescribed by Rule 21.
> . . ."

The Petition for Writ of Certiorari filed herein states under the heading of "Jurisdiction," on pages 2 and 3 therein, the background of the law suit presented for review but neglects to make any mention whatsoever of this Court's jurisdiction to entertain this matter. The petition is fatally defective in that the jurisdictional requirements of Rules 21.1(e)(iv), 21.2 and 27.2(b) were not followed by Petitioner.

2. THE DOCTRINE DEVELOPED IN PARRATT V. TAYLOR IS NOT APPLICABLE, AND WAS NOT ARGUED BELOW.

The issues presented below do not turn upon the doctrine developed in Parratt v. Taylor, 451 U.S. 527 (1981). Parratt, in dealing with 42 U.S.C. §1983, dealt with the negligent taking of property by an employee of a state, and dealt only with property interests.

The Court in Daniels v. Williams, 106 S.Ct. 662 (1986), goes on to say on page 663 in discussing Parratt:

> "We conclude that the due Process Clause is simply not implicated by negligent act of an official causing unintended loss of or injury to life, liberty or property"

Davidson v. Cannon, 106 S.Ct. 668 (1986), also states that the protections of the Due Process Clause, whether procedural or substantive, are just not triggered by lack of due care by prison officials. In this case the claim was always related to the intentional conduct of the prison officials, and as shown, the doctrine of Parratt does not apply.

Further, the only mention of Parratt in appellant's opening brief in the Ninth Circuit is found in a footnote with two other cases on page 14 therein, and is a footnote to the statement "at best plaintiff has alleged a cause of action for tort which could and should be brought in state court." This does not address the issues stated in petitioner's Petition for a Writ of Certiorari in discussing the "doctrine" developed in Parratt v. Taylor.

The Court declined to consider an issue which was raised for the first time in the petition for certiorari in United States v. Ortiz, 422 U.S. 891, 898 (1975). Ramsey v. Mine Workers, 401 U.S. 302, 312 (1971) held that it was inappropriate to consider an argument in the first instance. While in Lawn v. United States, 355 U.S. 339, 362 n.16 (1958) the Court held that only in exceptional cases will the Court review a question not raised in the Court below. No exceptional reasons have been advanced by Petitioners, and none exist.

3. THE PETITIONERS HEREIN WERE DEFAULTED, AND CANNOT NOW COMPLAIN ABOUT THE COURT'S RULINGS.

On page 8 of Petition for a Writ of Certiorari, the Petitioners stated that they were not appealing issue 2 of their case before the Ninth Circuit Court of Appeals which dealt with "whether the district court abused its discretion in refusing to set aside a default which had been entered when no response had been made to a complaint which had been served by convicted felons doing time in Arizona State Prison."

Therefore, there can be no question but that the default was valid and established the well-pleaded allgations of the complaint. In Re. Cons. Pretrial Proceedings in Air West, 436 F.Supp. 1281 (1987).

Even though the complaint was filed and prepared by a prisoner, not a lawyer, both the District Court and the Ninth Circuit found that the pleadings were sufficient to state a claim under 42 U.S.C. §1983 (see Petitioners Appendix A at P. 12.

Trans World Airlines, Inc., v. Hughes, 38 F.R.D. 409, 501 (1965) states clearly and concisely the law relating to defaults and the effect thereof. The following, found on page 501 of the opinion, properly states the position taken by Respondent herein.

> "By virtue of the default the defendant has admitted the truth of the well-pleaded allegations of the complaint. (cite)
> Allegations are not well pleaded if they are shown to be indefinite or erroneous by other statements in the complaint (cite); or where they are contrary to facts of which the court will take judicial notice (cite); or where they are not susceptible of proof by legitimate evidence (cite); or where they are contrary to uncontroverted material in the file of the case (cite). . . .
> If evidence merely tends to show that an allegation is not true, the allegation must be taken as true in the default. Finally, the plaintiff is entitled to the benefit of all reasonable inferences from the evidence tendered.
> Attempts by defendant to escape the effects of its default should be strictly circumscribed. It should not be afforded an opportunity to litigate what has already been deemed admitted in law. In the absence of an exceedingly strong showing that an allegation is untrue under the rules set forth above, the allegation stands as admitted." (emphasis added)

Geddes v. United Financial Group, 559 F.2d 557,560 (1977) states:

> "The general rule of law is that upon default the factual allegations of the complaint, except those relating to the amount of damages, will be taken as true (cite). Support for this general rule is found in Rule 8(d) of the Federal Rules of Civil Procedure which reads:
> "Averments in a pleading to which a responsive pleading is required, other then those as to the amount of damage, are admitted when not denied in the responsive pleading."
> Further support for the rule can be found in Federal Rule of Civil Procedure 55(b) which expressly autho-

rizes the court to conduct a hearing on the issue of damages before entering a judgment by default."

Pope v. United States, 323, U.S. 1, 655 S.Ct. 16, 89L. Ed. 3d (1944) holds that it is a judicial function and the exercise of the judicial power to render judgment when the defendant is in default.

In Re. Cons. Pretrial Proceedings in Air West, Supra, held that:

> "a default establishes the well-pleaded allegations of a complaint unless they are incapable of proof or are contrary to facts judically noticed or to uncontroverted material in the file. (cite). In addition, the party in whose favor a default has been entered is entitled to the benefit of all reasonable inferences from the evidence tendered, and attempts by the party agsint whom a default has been entered to attack the validity of the allegations deemed proven by the default are to be strictly circumscribed. (cite). This is so because a contrary rule would work to the benefit of the party who has obstructed the adjudication of an alleged wrongdoing by refusing to answer or otherwise defend, a result repugnant to the American system of justice."

A complete reading of the complaint shows that the respondent did in fact make well-pleaded allegations in his complaint. They were definite and not made erroneous by other statements in the complaint. They were not contrary to facts of which the court will take judicial notice. They were susceptable of proof by legitimate evidence (see transcript of Default Hearing), and such evidence was presented to the Court. They were not contrary to uncontroverted material in the file of the case. Trans World Airlines, Inc., v. Hughes, Supra.

The federal policy is of deciding cases on the basis of substantive rights rather than technicalities. Hines v. Wainwright, 539 F.2d 433, 434 (1976).

4. THE COMPLAINT WAS SUFFICIENT TO STATE A CLAIM UNDER 42 U.S.C. §1983.

As the Ninth Circuit stated, "Benny alleged that the guards deliberately stood aside while he was assaulted by other prisoners, and the Pipes struck him once. Because the guard's actions were intentional, not negligent, the guard's

argument must fail. Benny must be taken to have shown a violation of a substantive due process."

Thomas v. Booker, 784 F.2d 299, 303 (1986) states that "[P]rison officials may be liable where they are 'deliberately indifferent to [a prisoner's] constitutional rights, either because they actually intended to deprive him of some right, or because they acted with reckless disregard of his right to be free from violent attacks by fellow inmates.' Martin v. White, 742 F.2d 469, 474 (1984) (quoting Branchcomb v. Brewer, 669 F.2d 1297, 1298 (1982)."

The court must be referred back to Reason 2 herein for denying the Writ, in which Daniels v. Williams, Supra and Davidson v. Cannon, Supra, are cited to the court. It is clear from these cases that the complaint filed by Respondent was sufficient to state a valid claim under 42 U.S.C. §1983 as required, and the Petitioners' zeal in trying to convince the court that the complaint filed by Respondent does not properly allege that Petitioner's intentional conduct damaged the Respondent, must fail.

5. RESPONDENT STATED A VALID EIGHTH AMENDMENT CLAIM IN HIS COMPLAINT.

The Ninth Circuit was correct in stating the Respondent's complaint "alternatively" stated a valid §1983 claim based on the Eighth Amendment.

In discussing the Eighth Amendment prohibition against cruel and unusual punishment Martin v. White, Supra states:

> "Subjecting prisoners to violent attacks or sexual assaults, or constant fear of such violence, shocks modern sensibilities and serves no legitimate penological purpose. (cite). We reject as below any level of decency the theory that sexual or other assaults are a legitimate part of a prisoner's punishment. Accordingly, we have concluded that prison officials may be liable where they are "deliberately indifferent to [a prisoner's] constitutional rights, either because they actually

intended to deprive him of some right, or because they acted with reckless disregard of his right to be free from violent attacks by fellow inmates." (Cites)

The complaint filed by Respondent alleged intentional behavior on behalf of the Petitioners, and Watts v. Laurent, 774 F.2d 168, 172 (1985) in determining the standards governing whether a defendant may be held liable for depriving a plaintiff of rights secured under the Eight Amendment, stated:

> "In Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), the Supreme Court held that deliberate indifference to prisoners' serious medical needs constitutes the unnecessary and wanton infliction of pain that is the hallmark of cruel and unusual punishment. Id. at 104, 97 S.Ct. at 291. Since that case, this court has repeatedly recognized that the failure of institutional personal to protect a prisoner from the assaults of other prisoners can also rise to the level of an eighth amendment violation. (cite). Nevertheless, conduct that simply amounts to "mere negligence or inadvertence" is insufficient to justify the imposition of liability. (cite). Rather, "[i]n order to infer callous indifference when an official fails to protect a prisoner from the risk of attack, there must be a 'strong likelihood' rather than a 'mere possibility' that violence will occur." (cites). "[A] guard does not have to believe to a moral certainty that one inmate intends to attack another at a given place at a time certain before that officer is obligated to take septs to prevent such an assault." (cites). The failure to protect a prisoner on even a single occasion can give rise to liability where it can be inferred that an institutional employee should have realized that there was a "strong likelihood" of an attack." (cite).

Also, Miller v. Solem, 728 F.2d. 1020, 1024 (1984) stated that "a prisoner has a 'clearly established' Eighth Amendment right to be reasonably protected from known dangers of attacks by fellow inmates" (cite).

It therefore follows, that the respondent, in his complaint, did state a valid §1983 claim based on the Eighth Amendment.

CONCLUSION

Respondent respectfully submits that his complaint in the district court stated a valid 42 U.S.C. §1983 claim, and that the district court entered a valid judgment against the Petitioners. Petitioners were defaulted and cannot now claim that the well pled allegations therein were frivolous and should not have been allowed. No susbtantial issue has been

raised requiring this Court to grant the Writ of Certiorari and Respondent respectfully requests that the Petition be denied.

DATED this 4th day of August, 1987.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, JAMES T. BIALAC, a member of the Bar of this Court, hereby certify that, on this 4th day of August, 1987, one copy of the Brief of Respondent in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in the above-entitled case was mailed, first class postage prepaid, to Ronald J. Greenhalgh, Assistant Attorney General, 1275 West Washington, Phoenix, Arizona 85007, counsel for the Petitioners. I further certify that all parties required to be served have been served.

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